90-32

No. _____

In The

Supreme Court of the United States

October Term, 1990

THE SECRETARY OF THE STATE OF FLORIDA, and THE STATE OF FLORIDA,

Petitioners,

v.

DIANN WALKER, LOUVENIA JONES, PEARLIE WILLIAMS, GRACIE HOLTON, ROSA HENDERSON, DELORES COLSTON, BARBARA KING, DOROTHY ROBERTS, JACQUELINE ROSS, LINDA ISAAC, AND CHARLES STEWART,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Under *McDonnell Douglas-Burdine* standards, may a federal court of appeals conduct review following trial and reverse judgment in favor of employer which produced testimonial and documentary evidence to support its contention that it hired the most qualified, because the actual decisionmakers did not testify?

2. After a discrimination case is fully tried on the merits, may a federal court of appeals reverse based on its decision that employer's intermediate stage evidence was inadequate without proceeding directly to determine whether the record supports the trial court's finding on the ultimate issue of discrimination?

PARTIES TO THE PROCEEDINGS

Petitioners here, Secretary of the State of Florida, and the State of Florida were defendants-appellees below. Increase Minority Participation by Affirmative Change Today of Northwest. Florida, Inc., (IMPACT) Inc., on behalf of itself and its members, Diann Walker, Louvenia Jones, Pearlie Williams, Gracie Holton, Rosa Henderson, Delores Colston, Charles Stewart, Barbara King, Dorothy Roberts, were plaintiffs-appellants below. Jacqueline Ross and Linda Isaac were intervenors-appellants below. Clifford Simmons and Margarite Stewart were plaintiffs below. A class of all others similarly situated were designated plaintiffs-appellants below.

George Firestone was the Secretary of the State of Florida in proceedings below. Jim Smith is the current Secretary of the State of Florida. Marguerite Stewart settled her case in the district court. Clifford Simmons was not available for trial. His case was severed and has not been tried.

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Respondents.

Petitioners, the Secretary of the State of Florida and the State of Florida, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in this proceeding on February 6, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 893 F.2d 1189, and is reprinted in Appendix at 1a. The memorandum decision of the United States District Court for the Northern District of Florida

(Paul, Maurice M.) has not been reported, and is reprinted in the Appendix at 36a.

JURISDICTION

The Court of Appeals for the Eleventh Circuit entered judgment on February 6, 1990, and reversed the judgment of the United States District Court for the Northern District of Florida, entered August 11, 1986. The Court of Appeals denied a petition for rehearing on April 2, 1990, which was timely made under 11th Cir. R. 35-6. Petitioners invoke jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

28 U.S.C. § 1254(1)
[Reprinted in Appendix at 81a]

28 U.S.C. § 1291. Final decisions of district courts
[Reprinted in Appendix at 81a]

28 U.S.C. § 1331. Federal question
[Reprinted in Appendix at 82a]

42 U.S.C. § 1981. Equal rights under law
[Reprinted in Appendix at 82a]

42 U.S.C. § 1983. Civil action for deprivation of rights
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Equal Employment Opportunity Act of 1964, as amended, 42 U.S.C § 2000e et seq.
[Reprinted in Appendix at 83a]

Fed.R.Civ.P. 52(a). Findings by the court
[Reprinted in Appendix at 99a]

Fed.R.Evid. 301. Presumptions in General in Civil Actions and Proceedings
[Reprinted in Appendix at 95a]

Art. X. Contents of Writings, Recordings, and Photographs, Fed.R.Evid. 1001 - 1005.
[Reprinted in Appendix at 96a]

STATEMENT OF THE CASE

The District Court Case:

Respondents invoked jurisdiction of the federal district court under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., under 42 U.S.C. §§ 1981, 1983; and under 28 U.S.C § 1331.[1] Applicants filed this employment discrimination action on June 19, 1979, which alleged that Florida engaged in a pattern of racial discrimination. [R1-1; App. 36a] The cause came to trial during April of 1986 and lasted fifteen days. At trial eleven individuals presented over sixty claims, which were predominantly promotional claims. [App. 41a-80a]

The trial court discounted testimony of Applicants' expert, found Florida's expert credible, and determined that Applicants did not bear their burden to prove racial disparity in hiring or promotion. [App. 15a; 36a-38a]

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[1] Here Respondents will be referred to as "Applicants"; Petitioners, the Secretary of State for the State of Florida and the State of Florida will be referred to as "Florida". "App." denotes Appendix; "R" denotes Record.

Further, the trial court criticized Applicants' presentation of proof and decried their general lack of information concerning "what job was applied for, when, and who received it." [App. 39a]

Florida asserted that it based its employment decisions on candidates' qualifications. Florida presented a large volume of evidence which supported its contention. The trial court suggested that Florida did not have to present such a quantity of evidence in support of its legitimate reason but that since it did, Florida had more than sufficiently met its burden of production. [App. 41a]

Florida's case involved six days of testimony by supervisors of Applicants and State of Florida officials. [App. 25a] Because this was predominantly a promotional claims case, Florida was able to introduce a substantial quantity of documentary evidence which set forth Applicants' prior employment performance and their credentials. [App. 25a; 44a-80a] These documents included personnel files, work history, performance evaluations, and job applications. [App. 44a-80a] In addition, Florida introduced the selectees' employment applications, and the written qualifications for each targeted position. *Id. and* [*e.g.*, R. 31, T. 53] Florida asserted that certain Applicants were not promoted because, for example, their records revealed:

> . . . dismissal for physically striking a supervisor; failure to take a qualifying exam at the suggestion of the supervisor; a history of conditional and unsatisfactory evaluations by both black and white supervisors; a poor attendance record; rudeness to customers; excessive errors; disruptive and loud behavior; failure to listen to criticism; lack of motivation and initiative;

> attendance of an unaccredited college; and misrepresentation of educational qualifications on an employment application.

[App. 26a]

Further, Florida presented evidence which contradicted some Applicants' claims that they applied for "available" positions. [App. 42a] In most instances, Florida's evidence revealed that the selectee had more tenure on the job, experience in a specific area, or higher educational credentials than did Applicant. [App. 44a-80a]

The trial court assumed without deciding that Applicants established a prima facie case and ruled that Florida had more than sufficiently met its burden of production. The trial court ruled that Applicants at all times carried the burden of persuasion. [App. 36a-40a] The court held that Applicants failed to show by a preponderance of evidence that they had superior qualifications, or to demonstrate through anecdote or statistics that Florida's asserted reason was a pretext for actual discriminatory practices. [App. 42a; 43a-80a]

The Case in the Eleventh Circuit:

Applicants invoked jurisdiction below under 28 U.S.C. § 1291. The Eleventh Circuit reviewed five issues on appeal. [App. 8a] The first issue, "Did the defendants properly articulate a legitimate non-discriminatory reason for the employment decisions when the trial court assumed that a prima facie case had been made out by the plaintiffs?", is the critical issue here. *Id.*

The Eleventh Circuit reasoned that because Florida did not offer proof by any person who made the actual

employment decision, that Florida's extensive testimonial and documentary evidence did not constitute an "articulation" of a nondiscriminatory reason. [App. 11a-12a] The Eleventh Circuit determined Applicants did not have sufficient opportunity to establish pretext, absent the actual decisionmakers' presence in court, and reversed the trial court judgment.

Circuit Judge Edmondson, in his dissent, stated that adequate evidence supported the trial court's findings, and that the majority failed to apply the clearly erroneous standard. [App. 22a-23a] Further, the dissent recognized that Florida presented a significant quantity of evidence supporting its employment actions – notwithstanding the opinion of the trial court that Florida was not required to supply such a quantity of evidence. [App. 20a-30a] The dissent noted that because Florida did produce evidence in response to each claim in support of its position that it chose the most qualified, "no mystery cloaked [Florida's] position about why [Applicants] were not promoted". [App. 25a].

WHY THE WRIT SHOULD BE GRANTED

POINT 1

Under *McDonnell Douglas-Burdine* standards, may a federal court of appeals conduct review following trial and reverse judgment in favor of employer which produced testimonial and documentary evidence to support its contention that it hired the most qualified, because the actual decisionmakers did not testify?

Introduction:

The Eleventh Circuit committed error in reversing the district court's judgment just because Florida did not

produce a witness who could testify for each employment decision that, "I promoted ___, who I believed to be the most qualified person because . . . ." [App. 27a] In an untoward manner the decision prescribes exactly what evidence an employer – such as the State of Florida – must produce when faced with employment discrimination claims, where the employer's articulated reason invokes policy to choose the most qualified. *See Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) *and McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

Under the holding below, the employer would be unable to establish a defense where the actual decisionmaker is unavailable or unable to testify. The burden of production to articulate a non-discriminatory reason for an employment decision under *McDonnell Douglas-Burdine* standards has never been so narrowly or specifically construed, nor should it be. Certiorari should be granted here for plenary review or in the alternative granted to vacate and reverse or remand.

The Error Below:

At trial Florida introduced testimony that Florida chose the most qualified candidates for promotion. Florida supported its contention with documentary and testimonial evidence about the relative qualifications of Applicants and of those selected for each identified position. [App. 25a] Because the actual decisionmaker did not testify, however, the Eleventh Circuit determined that Florida's quantity of evidence was insufficient to meet its burden to frame the legitimate reason issue for Applicants.

The Eleventh Circuit is wrong. Florida provided Applicants with ample notice of its reasons for its employment decisions. The actual decisionmaker does not need to testify in order to frame the issue to provide fair opportunity to establish pretext. The Eleventh Circuit is wrong because its decision confines the employer to the use of a certain type of direct testimonial evidence to satisfy its intermediate burden, in conflict with the Federal Rules of Evidence and the precedent cases. *See, e.g.*, Fed.R.Evid. 301, 1001-1005; *and Burdine, supra; McDonnell Douglas, supra.*

Under the precedent cases, the employer maintains the burden to come forward with *admissible evidence* – not a certain type of evidence – in order to frame the reason issue. Federal Rule of Evidence 301 permits a presumption to be overcome through the introduction of "evidence", period. Evidence under the Rules may be documentary and/or testimonial, direct and/or circumstantial. Prior to the decision below the Federal Rules of Evidence applied in their entirety to a discrimination case.

Florida unequivocally advised Applicants that it relied on qualifications in making employment decisions. [App. 25a] Applicants were provided ample opportunity to establish pretext by a) showing that they were more qualified than the selectees, or b) presenting anecdotal or statistical evidence showing that more likely than not the "superior qualifications" reason was pretext for an actual discriminatory motive. [App. 40a-43a] This they failed to do.

The Eleventh Circuit by its error has created an impossible situation for both Florida and other employers faced in the future with discrimination claims, under circumstances where the actual decisionmakers are unavailable, unable, or unwilling to testify.

The Conflict.

Certiorari should be granted here because the Eleventh Circuit's decision conflicts with the precedent decision of this Court in *Burdine*, 450 U.S. 248. *Burdine* held that defendant must rebut the prima facie presumption of discrimination by introducing admissible evidence that plaintiff was rejected for a legitimate, nondiscriminatory reason. *Id.* at 254. *See also McDonnell Douglas*, 411 U.S. at 802-803. Neither *Burdine* nor *McDonnell Douglas* require a specific type of evidence to satisfy employer's burden.

The Eleventh Circuit's decision conflicts directly with the *Burdine* burden standards and with the principles established in that case upon which those standards are based. *See generally United States v. National Bank of Commerce*, 472 U.S. 713 (1985) (certiorari granted based on appearance of direct or principle conflict); *Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753 (1985) (certiorari granted based on conflict in principle). *Burdine* holds that the sufficiency of employer's evidence should be evaluated only in terms of whether a legitimate reason has been presented and whether plaintiff has "full and fair" opportunity to establish pretext. *Id.* at 255-56. The Eleventh Circuit, however, has determined that employer's evidence should be evaluated in terms of

whether it includes a certain type of direct, testimonial evidence.

The Eleventh Circuit's decision here also conflicts with other Courts of Appeals. The Fifth Circuit has decided in *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3744 (U.S. April 17, 1990) (No. 89-1617) that it is permissible for employer to present its legitimate reason through argument of counsel, as long as it is related to some record facts. *Bernard* conflicts in principle with the Eleventh Circuit here in that it broadens rather than narrows what would constitute an adequate employer's production. *Bernard* is pending before this Court.

The decision in *Mills v. Ford Motor Company*, 800 F.2d 635, 639 (6th Cir. 1986), – involving a discriminatory discharge claim – conflicts with the decision here. The *Mills* court held that documentary evidence in the form of employment performance evaluations was sufficient to establish employer's articulation. The court ruled that employer's failure to call Mills' actual supervisors to testify was simply an additional evidentiary factor "to be considered in evaluating whether the non-discriminatory reason was pretext". *Id.* at 639

Further, the *Mills* court held that failure to produce the decisionmakers' testimony had "no bearing" on the district court's acceptance of employer's articulated non-discriminatory reason for its employment decision. *Id.* at 639. According to the court, Mills was able to establish pretext by a narrow margin through testimony which contradicted the employment documents, because supervisors did not come forward to explain these documents.

Id. at 640. The Eleventh Circuit, in conflict, found that failure to present decisionmakers' testimony would constitute a failure to rebut an initial inference of discrimination. In this case Applicants presented no evidence to refute what the employment documents revealed.

Likewise, *McDonald v. United Airlines, Inc.*, 745 F.2d 1081, 1087 (7th Cir. 1984), *cert denied*, 471 U.S. 1065 (1985) – a gender discrimination case evaluated under *Burdine* standards – produces conflict with the decision here. The *McDonald* court stated that employer must come forward with "admissible evidence and not merely an answer to the complaint or argument of counsel." The *McDonald* court suggested that employer could produce, e.g., extrinsic evidence of plaintiff's employment history, or impeach plaintiff on cross-examination, to rebut plaintiff's prima facie case. *Id.* at 1088. The *McDonald* court held that where *admissible evidence is not available in any form*, then the trier of fact should conclude that the defendant has failed to meet its burden. The Eleventh Circuit here held that even where evidence is produced, if the decisionmaker is not available the plaintiff must prevail.

Mitchell v. Baldridge, 759 F.2d 80 (D.C. Cir. 1985) – which involved superior qualifications and Rule 41(b) dismissal issues – also conflicts with the Eleventh Circuit's decision here. The *Mitchell* court suggested that a successful "articulation" could occur where the employer's counsel directs plaintiff's attention to the superior qualifications of the selected candidate during plaintiff's case in chief. The court held that it was not sufficient for the trial court to first address the subject after plaintiff rested. *Id.* at 83. The court stated:

> . . . if evidence of selectees' superior qualifications had been presented by defendant during plaintiff's case-in-chief, and plaintiff had been given a full and fair opportunity to rebut, the district court could have rested a Rule 41(b) dismissal on a finding that the employer's decisions simply reflected the superior qualifications of the selectees, and not discriminatory motives.

Id. at 88-89. In this case, however, the Eleventh Circuit decided that even after full trial it was not sufficient notice to Applicants for Florida's witnesses to discuss the candidates' qualifications, and to point out that the employment documents demonstrated that the selectees were better qualified than were Applicants.

Finally, the Eighth Circuit in *Gray v. University of Arkansas*, 883 F.2d 1394, 1401 (8th Cir. 1989), and the Sixth Circuit in *Tye v. Board of Education of the Polaris Joint Voc. School Dist.*, 811 F.2d 315, 317-319 (6th Cir. 1987), *cert denied* 484 U.S. 924 (1987), held that employer may articulate even untrue reasons as long as plaintiff is provided with opportunity to show that the proffered explanation is pretext for actual discrimination. The *Tye* court held that employer's intermediate burden would be satisfied through the introduction of even a "reconstructed document" listing ten admittedly *untrue* reasons for the employment decision. *Tye* at 318-319, n. 2. *Gray* held that the only relevant inquiry was whether the decision was based on an illegal motive. *Gray* at 1401.

The Importance of the Decision:

The State of Florida along with other public employers are at risk for experiencing employment

discrimination suits by virtue of the fact that those employers maintain extensive personnel needs and must make frequent hiring and promotional decisions – thereby disappointing numerous candidates.[2] In addition, disgruntled employees often consider such employers a proverbial "deep pocket". Due to keen competition from the more lucrative private sector, public employers also experience frequent staff turnover and a loss of contact with former employees. When those employers are faced with discrimination claims, they will often be unable to produce the actual decisionmaker to testify concerning his or her employment decision. Under the decision here, those unfortunate employers would be unable to establish a defense even though the targeted decision occurred on legitimate grounds.

What the Eleventh Circuit fails to accept is the fact that a major employer, such as the State of Florida, does maintain a well-established personnel system encompassing a clearly defined comprehensive record-keeping structure and clearly defined hiring and promotional practices guidelines. Florida, like most employers, bases its employment decisions on a determination of which candidate is the most qualified for an available position. *See, e.g., International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358 n. 44 (1977) (absence or relative lack of qualifications is one of the two most common legitimate reasons upon which an employer might rely

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[2] The State of Florida, according to the personnel office of the Division of Administration, employs approximately 148,744 individuals under its various departments. The Department of State, targeted in this case, has 732 employees.

for its decisions). In those situations where the employer is sued and the actual decisionmaker is unavailable, unable, or unwilling to testify, employment records would be readily available at trial to precisely frame the reason issue for plaintiffs. This is particularly true in cases, such as here, where the claims revolve around a promotional decision. Under those circumstances the employer would have extensive documentation available which accurately reflects plaintiffs' employment history. The plaintiffs would have due notice and ample opportunity to persuade the trier of fact that the reason offered is pretextual.

The Eleventh Circuit has placed an intolerable burden on the employer by holding that employment documents and the testimony of other knowledgeable witnesses cannot constitute evidence of a legitimate reason, absent the testimony of the actual decisionmaker. The applicant prevails if the decisionmaker does not testify.

POINT 2

After a discrimination case is fully tried on the merits, may a federal court of appeals reverse based on its decision that employer's intermediate stage evidence was inadequate without proceeding directly to determine whether the record supports the trial court's finding on the ultimate issue of discrimination?

Introduction:

Certiorari should be granted here because the Eleventh Circuit reviewed Florida's "articulation" evidence apart from any other evidence and reversed the trial

court's judgment without determining whether the record in its entirety supported the finding that intentional discrimination did not exist.

The Error Below:

The Eleventh Circuit failed to follow established standards for appellate review because the court did not proceed directly to determine whether or not the trial court was clearly erroneous in its finding on the discrimination issue.

The analysis performed by the Eleventh Circuit was wrong. A discrimination case should not be removed from the realm of other types of cases which are subject to appellate review. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 575 (1985), *citing McDonnell Douglas* (burden of production sequence does not create special rules of civil procedure for discrimination cases); *and United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983) (once case fully tried a rigid *McDonnell Douglas – Burdine* analysis should not be pursued).

Federal Rule of Civil Procedure 52(a) in pertinent part reads:

> . . . Findings of fact, whether based on *oral or documentary evidence*, shall not be set aside unless clearly erroneous, . . . [emphasis supplied].

The trial court in this case entered *forty-nine pages of findings and conclusions*. [App. 43a-80a] By way of example regarding Applicant Rosa Henderson, the trial court stated:

> Plaintiff contends that her attitude was not bad, that she was given these low evaluations without justification because of her race. Rosa Henderson's bad attitude was apparent even in the Court room during trial. The Court finds that these evaluations were not motivated by race and were properly considered when plaintiff Henderson applied for other positions.

[App. 72a] Based upon the evidence both parties presented, the trial court here determined that Florida clearly articulated a non-discriminatory reason, that Applicants failed to carry their burden of persuasion on the ultimate issue, and that, therefore, intentional discrimination did not exist. The Eleventh Circuit reversed.

The Eleventh Circuit is wrong because it based its reversal on its decision that Florida did not produce a successful "articulation". As Judge Edmondson explained in his dissent, the court erred because it failed to review this case of alleged discrimination "as any other trial in which the district court sits as factfinder" and failed to "proceed directly to the ultimate question of intentional discrimination;" *citing Bazemore v. Friday*, 478 U.S. 385, 398 (1986) (Brennan J., concurring in part). [App. 21a-22a]

The Conflict:

After a case is fully tried on the merits – as it was here – the appellate court's task upon review is to determine whether the trial court was clearly erroneous in its finding on the intentional discrimination issue. *Bazemore*, 478 U.S. at 398.

The Eleventh Circuit performed its review in a manner which conflicts with the task allotted to the appellate court in *Gray*, 883 F.2d at 1402. The *Gray* court stated:

> Our task on appeal *is not . . . to determine whether the evidence offered at each sequence of the McDonnell Douglas analysis was adequate*. Rather, after the district court has decided the ultimate question of discrimination *vel non*, we determine whether the record supports the court's finding that [the defendant] did not dismiss [plaintiff] because of her sex. [Emphasis supplied.]

Id. at 1402; *citing, Aikens, supra; MacDissi v. Valmont Industries, Inc*, 856 F.2d 1054, 1059-60 (8th Cir. 1988); *Crutchfield v. Maverick Tube Corp.*, 854 F.2d 307, 309 (8th Cir. 1988). The *Gray* court held that if there is no objective documentary evidence to contradict employer's evidence and if employer's evidence is "internally consistent and plausible on its face", such that a "reasonable factfinder" would credit it, the reviewing court must affirm the trial court's judgment as not clearly erroneous.

In conflict, the Eleventh Circuit focused the analysis on whether Florida's evidence was adequate, rather than on the record in its entirety and whether it supported the finding on the ultimate issue. In *Ottaviani v. State University of New York at New Paltz*, 875 F.2d 365, 374 (2d Cir. 1989), *cert denied*, 110 S.Ct. 721 (1990) the court stated recent precedent has made it clear the appellate court may not reverse a finding that plaintiffs "failed to preponderate" on their claim unless it is clearly erroneous in light of all the record evidence or rests on legal error.

Likewise, in *Comeaux v. Uniroyal Chemical Corp.*, 849 F.2d 191, 193 (5th Cir. 1988) the court held that when a Title VII disparate treatment case has been fully tried on the merits, "appellate review appropriately focuses on whether plaintiff met its burden of proof as to discriminatory intent." Finally, in *Doe v. First National Bank of Chicago*, 865 F.2d 846, 874 (7th Cir. 1989), the court stated:

> If the district court's account of the evidence is plausible in light of *the record viewed in its entirety, the court of appeals may not reverse it* even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. [Emphasis supplied].

The Eleventh Circuit decision is in conflict with both *Comeaux* and *Doe*.

The Importance of the Decision:

If a court of appeals re-weighs and re-examines the nature of employer's evidence at the intermediate stage – as it did here – without consideration of the evidence in its entirety vis-à-vis the plaintiff's ultimate burden of persuasion, a separate standard of review would be established in the discrimination arena. This separate standard would allow the appellate court to sit as fact-finder and would render discrimination cases far more susceptible to reversal. Litigants and the federal courts would be subjected to unnecessary expenditure of both time and financial resources.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the Eleventh Circuit should be granted and the case subjected to plenary review or in the alternative granted to vacate and reverse or remand.

Respectfully submitted,

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